

TRANSCRIPT OF RECORD.

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United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

Oct TERM, 1892

NO. 97

MARIA AMACKER, ET AL.,

Plaintiffs in Error.

vs.

NORTHERN PACIFIC RAILROAD COMPANY,

Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MONTANA.

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C. K. Wells Co., Printers, Helena, Mont.

FILED  
APR - 1 1893



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Plaintiffs in Error.

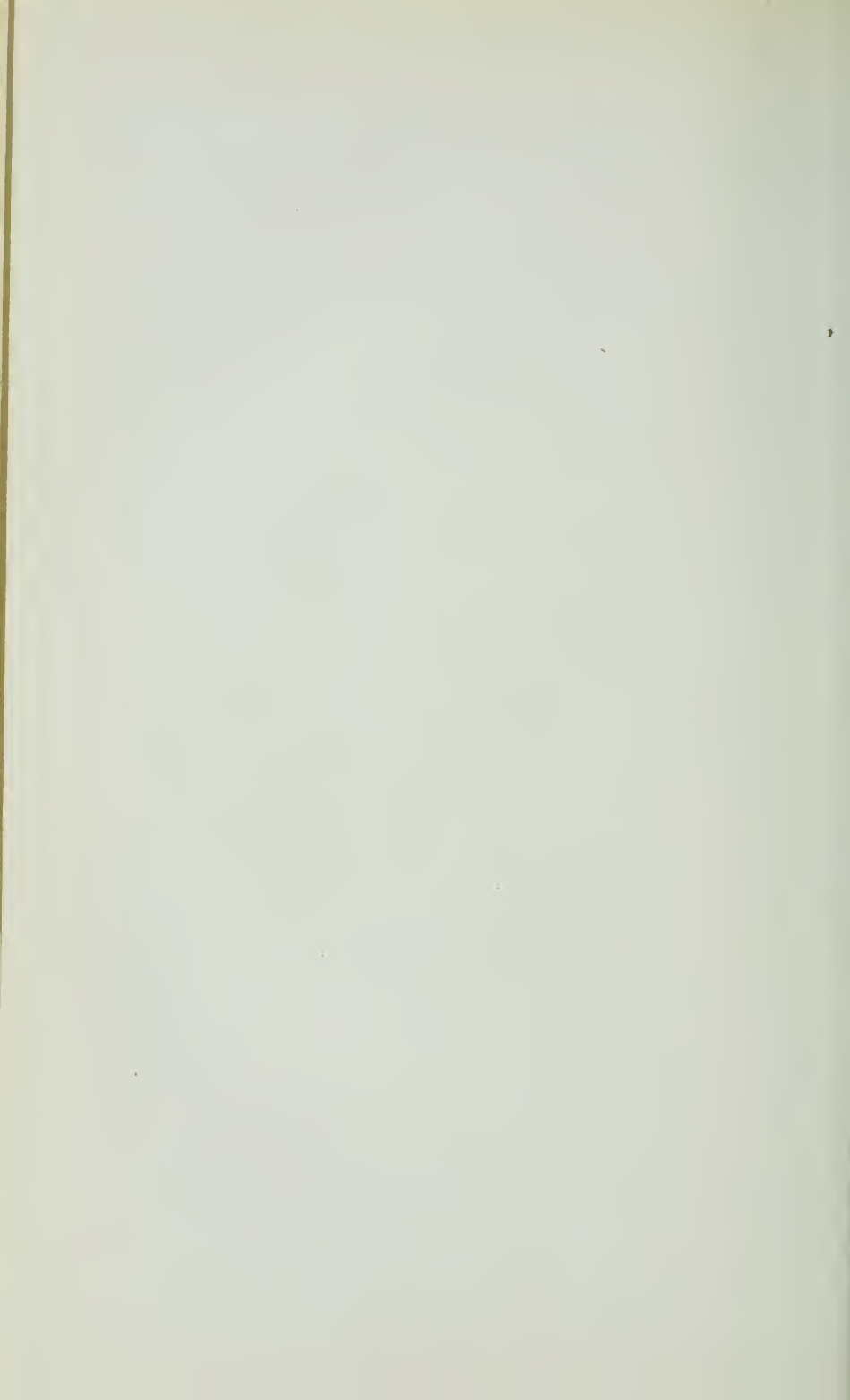
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UNITED STATES OF AMERICA—ss.

*The President of the United States of America; to the Judges of the Circuit Court of the United States, for the Ninth Circuit, District of Montana*—GREETING :

Because in the record and proceedings, and also in the rendition of the Judgment of a plea which is in the said Circuit Court, before you, between Northern Pacific Railroad Company, Plaintiff, and Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants, a manifest error hath happened, to the great damage of the said Maria Amacker, and others defendants, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, on the 21st day of January next, in the said U. S. Circuit Court of Appeals for the Ninth Circuit, to be there and then held, that the record and proceedings aforesaid be inspected; the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22d day of December, in the year of our Lord one thousand eight [SEAL.] hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

GEORGE W. SPROULE, Clerk.

The above writ of error is hereby allowed.

HIRAM KNOWLES, Judge.

Endorsed: (Title of Court, Title of Cause.) Writ of error. Copy deposited in Clerk's office, U. S. Circuit Court, for defendants in error, this 22d day of December, 1892. Geo. W. Sproule, Clerk.

Filed December 22, 1892. Geo. W. Sproule, Clerk.

The answer of the Judges of the Circuit Court of the United States for the Ninth Judicial Circuit for the District of Montana.

The record and all proceedings of the plaintiff wherein mention is within made, with all things touching the same, we certify under the seal of our said Court to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the Court.

[SEAL.]

GEORGE W. SPROULE, Clerk.

UNITED STATES OF AMERICA—SS.

*To Northern Pacific Railroad Company, Greeting:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 21st day of January, A. D. 1893, pursuant to a writ of error filed in the office of the Clerk of the United States Circuit Court for the District of Montana, wherein Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Hiram Knowles, Judge of the District Court of the United States, this 22d day of December, [SEAL.] A. D. 1892, and of the Independence of the United States the one hundred and seventeenth.

HIRAM KNOWLES,

One of the Judges of the Circuit Court.

Due service of the above citation, and of the writ of error therein mention on this 22d day of December, 1892, is hereby admitted.

Dated December 22, 1892.

F. M. DUDLEY,  
W. E. CULLEN,

Attorneys for Northern Pacific Railroad company, Defendant in error.

Endorsed: (Title of Court, Title of Cause.) Citation copy received this 22d day of December, 1892. F. M. Dudley and W. E.



Cullen, attorneys for plaintiffs. Filed December 22, 1892. Geo. W. Sproule, Clerk.

Pleas in the Circuit Court of the United States for the District of Montana, held at the United States Court room, in the city of Helena, in the District aforesaid, before the Honorable Hiram Knowles, United States District Judge for the District of Montana, presiding as one of the Judges of the Circuit Court of the United States for the Ninth Judicial Circuit, on Thursday, the 22d day of December, A. D. 1892, in the November Term of said Court, in the year of our Lord, one thousand, eight hundred and nine-two, and of the Independence of the United States the one hundred and seventeenth.

GEO. W. SPROULE, Clerk.

Northern Pacific Railroad Company,  
vs. Plaintiff,

Maria Amacker, John J. Amacker, her  
husband, George S. Howell, George  
Gotthardt, Walter H. Little, Alexan-  
der J. Steele, Frank H. Pings, John  
Blank, Joseph Jordan, Herbert B.  
Reed, and George Dibert,  
Defendants.

*Be it remembered*, that on the 8th day of May, A. D. 1891, came the plaintiff, by its attorneys, F. M. Dudley, Cullen, Sanders & Shelton, and filed in the office of the Clerk of the Circuit Court of the United States, for the District of Montana, at Helena, in said District, their Complaint in said above entitled cause, which said Complaint is in the words and figures following, to-wit:

In the Circuit Court of the United States, for the Ninth Circuit,  
District of Montana.

Northern Pacific Railroad Company,  
vs. Plaintiff,

Maria Amacker, John J. Amacker, her  
husband, George S. Howell, George  
Gotthardt, Walter H. Little, Alexan-  
der J. Steele, Frank H. Pings, John  
Blank, Joseph Jordan, Herbert B.  
Reed and George Dibert,  
Defendants.

#### COMPLAINT.

For cause of action against said defendants, plaintiff complains and alleges :

I. That it is a corporation, organized and existing under and by virtue of an act of Congress, approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern route," and those acts and joint resolutions supplementary thereto and amendatory thereof.

II. That it is and was, at all the times hereinafter mentioned, the owner of and entitled to the possession of the south half of the northwest quarter of section seventeen (17), township ten (10), north of range three (3), west of the principal meridian of Montana.

III. That on the            day of            1890, while the plaintiff was seized in fee simple of said land, the said defendants, without right or title, entered into the possession thereof, against the will and without the consent of the plaintiff, and ousted and ejected plaintiff therefrom, and now unlawfully withhold possession thereof from plaintiff.

IV. That said land is of the value of over ten thousand dollars.

Wherefore plaintiff prays judgment against said defendants for the recovery of possession of said land, and for its costs and disbursements herein.

CULLEN, SANDERS & SHELTON, and  
F. M. DUDLEY,

Attorneys for Plaintiff.

State of Montana.            }  
County of Lewis and Clarke. } ss.

F. M. Dudley, being duly sworn, says: That he is an officer of the above named plaintiff, to-wit, its general land attorney; that he has read the foregoing complaint and knows the contents thereof, and that the same is true according to his best knowledge, information and belief.

F. M. DUDLEY.

Subscribed and sworn to before me this 6th day of May, 1891.

[SEAL.]

CHARLES H. COOPER,

Notary Public.

Endorsed: (Title of Court, Title of Cause.) Complaint filed May 8, 1891. Geo. W. Sproule, Clerk.

And thereafter, on the 8th day of May, 1891, there issued out of said Clerk's office a writ of summons in said entitled cause, which said writ, together with the return of the Marshal thereto attached, are in the words and figures, following, to-wit:

United States of America.

Circuit Court of the United States, Ninth Circuit, District of  
Montana.

Northern Pacific Railroad Company,

vs.

Maria Amacker, John J. Amacker, her  
husband, George S. Howell, George  
Gotthardt, Walter H. Little, Alexander  
J. Steele, Frank H. Pings, John  
Blank, Joseph Jordan, Herbert B.  
Reed and George Dibert,

Plaintiff,

Defendants.

Action brought in the  
said Circuit Court, and  
the Complaint filed in  
the office of the Clerk  
of said Circuit Court, in  
the City of Helena and  
County of Lewis and  
Clarke.

The President of the United States of America—Greeting:

To Maria Amacker, John J. Amacker, her husband, George S.  
Howell, George Gotthardt, Walter H. Little, Alexander J.  
Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B.  
Reed and George Dibert, Defendants.

You are hereby required to appear in an action brought against  
you by the above named plaintiff, in the Circuit Court of the United  
States, Ninth Circuit, in and for the District of Montana, and to file  
your plea, answer, or demurrer, to the complaint filed therein (a  
certified copy of which accompanies this summons), in the office of  
the Clerk of said Court, in the City of Helena, and County of Lewis  
and Clarke, within twenty days after the service on you of this  
summons, or judgment by default will be taken against you.

The said action is brought to recover from you said defendants  
the possession of that certain piece, parcel or tract of land described  
as follows: The south half of the northwest quarter of section  
seventeen (17), township ten (10), north of range three (3) west of  
the principal meridian of Montana; which you said defendants on  
the                    day of                    1890, while plaintiff was seized  
in fee simple, ousted and ejected plaintiff therefrom, and now unlaw-  
fully with hold possession thereof from plaintiff, and for costs and dis-  
bursements herein; all of which is more fully set out in the original  
complaint on file herein, to which reference is hereby made, and if  
you fail to appear and plead, answer or demur, as herein required,  
your default will be entered and the plaintiff will apply to the Court  
for the relief demanded in the complaint herein.

WITNESS the Honorable Melville W. Fuller, Chief Justice of  
the Supreme Court of the United States, this 8th day of  
[SEAL.] May, in the year of our Lord one thousand eight hun-  
dred and ninety-one, and of our Independence the 115th.

GEO. W. SPROULE, Clerk.

United States Marshal's Office, {  
 District of Montana. }

I HEREBY CERTIFY, That I received the within writ on the 8th day of May, 1891, and personally served the same on the dates named day of May, 1891, by delivering to and leaving with Maria Amacker and John J. Amacker (16th), Frank H. Pings (26th), A. J. Steele, H. B. Reed, W. H. Little, Geo. S. Howell, Geo. Dibert, J. Jordan, Geo. Gotthardt, John Blank (12th), said defendants named therein, personally, at the County of Lewis and Clarke, in said District, a certified copy thereof, together with a copy of the complaint certified to by Clerk of said Circuit Court attached thereto.

WM. F. FURAY, U. S. Marshal.

By GEORGE LEEKLEY, Deputy.

Helena, May 27, 1891.

Endorsed: No. 140 U. S. Circuit Court, Ninth Circuit, District of Montana, Northern Pacific Railroad Company vs. Maria Amacker et al. Summons. Cullen, Sanders & Shelton and F. M. Dudley, plaintiff's attorneys. Filed June 6th, 1891. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 20th day of June, 1891, came the defendants, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, by their attorney, Thomas C. Bach, and filed their answer to said complaint, which said answer is in the words and figures, following to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Northern Pacific Railroad Company,  
 Plaintiff.

vs.

Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert,  
 Defendants.

The defendants, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, who appear by Thos. C. Bach, their attorney, for answer to the complaint herein:

1st. Deny that the plaintiff is or ever was the owner of or entitled to the possession of the south half of the northwest quarter of section 17, township 10, north of range 3 west of the principal meridian of Montana, or any part thereof.

2d. Denies that defendants, or any of them, ever or at all ousted or ejected plaintiff from said premises or any thereof, or that they or any of them unlawfully withheld the possession thereof, or any thereof from such plaintiff.

Wherefore defendants pray judgment against the plaintiff that the complaint of plaintiff be dismissed, and that they recover their costs in this case expended.

THOS. C. BACH,  
Attorney for Defendants named.

State of Montana, }  
County of Lewis and Clarke. } ss.

Walter H. Little, being duly sworn, says that he is one of the defendants answering herein, and that he and they are united in their interests and pleading in this case, and that he is acquainted with the facts of this case; that he has read the foregoing pleading, and knows the contents thereof, and that the facts therein stated are true to his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

WALTER H. LITTLE.

Subscribed and sworn to before me this 20th day of June, 1891.

THOS. C. BACH,  
Notary Public in and for Lewis and Clarke County, State of Montana.

I do hereby certify that in my opinion the foregoing answer is well founded in law.

THOS. C. BACH,  
Attorney for Defendants.

Service of the above answer this 20th day of June, 1891, is admitted.

CULLEN, SANDERS & SHELTON,  
Attorneys for Plaintiff.

Endorsed: (Title of Court, Title of Cause.) Answer. Thos. C. Bach, attorney for defendants named in answer. Filed June 20, 1891. Geo. W. Sproule, Clerk, by W. J. Kennedy, Deputy Clerk.

And thereafter, to-wit, on the 18th day of March, 1892, came

the defendants, Maria Amacker and John J. Amacker, by their attorney, Massena Bullard, and filed their separate answer to said complaint; which said separate answer is in the words and figures following, to-wit:

In the Circuit Court of the United States for the Ninth Circuit,  
District of Montana.

Northern Pacific Railroad Company,  
vs. Plaintiff,

Maria Amacker, John J. Amacker, her  
husband, George S. Howell, George  
Gotthardt, Walter H. Little, Alexander  
J. Steele, Frank G. Pings, John  
Blank, Joseph Jordan, Herbert B.  
Reed and George Dibert,  
Defendants.

Separate Answer of Maria Amacker and John J. Amacker.

And now come Maria Amacker and John J. Amacker, two of the defendants above named, and for their separate answer to the complaint of the plaintiff,

First. Deny that the said plaintiff is, or was at all the times or any of the times, or ever, the owner of or entitled to the possession of the south half of the northwest quarter of section number seventeen (17), in township ten (10), north of range number three (3), west of the principal meridian of Montana; or that plaintiff is, or ever was, the owner of or entitled to the possession of any part or portion of said premises.

Second. Deny that the plaintiff was at the time mentioned in said complaint seized in fee simple of said land, or had any interest therein, and deny that these defendants or either of them, without right or title entered into the possession thereof, and deny that these defendants or either of them ousted or ejected the plaintiff from said premises, or any part thereof, and deny that these defendants or either of them now unlawfully withhold possession of said premises from the plaintiff.

*Wherefore*, having fully answered said complaint, these defendants pray to be discharged with their costs in this behalf expended.

MASSENA BULLARD,

Attorney for answering defendants.

State of Montana, {  
County of Lewis and Clarke. } ss.

Maria Amacker, being duly sworn, says: That she is one of



the answering defendants named in the foregoing answer, and acquainted with the facts therein stated; that she has read the foregoing answer and knows the contents thereof, and that the same is true of her own knowledge except as to those matters which are therein stated upon her information and belief, and as to those matters she believes the same to be true.

MARIA AMACKER.

Subscribed and sworn to before me this fifteenth day of March, in the year of our Lord 1892.

[SEAL.]

J. MILLER SMITH,  
Notary Public.

Endorsed: No. 140. Northern Pacific R. R. Co. vs. Maria Amacker, et al. Separate answer of Maria Amacker and John J. Amacker. Due and legal service of the within answer accepted this sixteenth day of March, A. D. 1892. Cullen, Sanders & Shelton, Attys. for Plaintiff. Filed March 18th, 1892. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 7th day of April, 1892, the following proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker et al.

Ordered that this cause be, and the same hereby is, set for trial May 11, 1892, at 10 a. m.

And thereafter, on the 23d day of May, 1892, a stipulation was filed herein waiving a jury in said cause, which stipulation as filed is in words and figures following, to-wit:

In the Circuit Court of the United States for the Ninth Circuit,  
District of Montana.

Northern Pacific Railroad Company,	}
Plaintiff,	
vs.	}
Maria Amacker et al.,	
Defendants.	

It is hereby stipulated and agreed between all parties hereto before and at the commencement of the trial of the above cause that

a jury is waived and that said cause be tried to the Court without a jury.

Dated May 23, 1892.

CULLEN, SANDERS & SHELTON, and  
F. M. DUDLEY,

Attorneys for Plaintiff.

THOS. C. BACH,

Attorney for Defendants.

MASSENA BULLARD,

Attorney for John J. Amacker and Maria Amacker, Defendants.

Endorsed: No. 140. Northern Pacific Railroad Company vs. George S. Howell et al. Stipulation. Filed May 23, 1892. George W. Sproule, Clerk.

And thereafter, to-wit: on the 23d day of May, 1892, the following further proceedings were had and entered of record herein in the words and figures following, to-wit:

(Title of Court.)

Northern Pacific Railroad Company vs. George S. Howell, et al.

This cause coming on for trial this day before the Court sitting without a jury, a trial by jury having been waived by written stipulation of the respective counsel herein; Messrs. F. M. Dudley, Cullen, Sanders & Shelton appeared for plaintiff, and Messrs. Thomas C. Bach and Massena Bullard appeared for the defendants; George M. Bourquin and W. M. Scott sworn as witnesses for plaintiff and certain documentary evidence introduced, and thereupon W. H. Little and Maria Amacker sworn as witnesses for defendants and certain documentary evidence introduced, and thereupon evidence being closed, after argument of counsel, cause submitted to the Court for consideration and decision.

And thereafter, to-wit: on the 14th day of November, 1892, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker, et al.

This cause, heretofore tried and submitted to the court for decision, came on this day for the judgment of the court, and thereupon after due consideration, it is ordered that judgment be entered in this cause in favor of plaintiff and against defendants for the possession of the lands described in the complaint and for its cost of suit.



And on said 14th day of November, 1892, the court filed its opinion in said cause, which said opinion so filed is in the words and figures following, to-wit:

In the United States Circuit Court, District of Montana.

The Northern Pacific Railroad Company, )  
Plaintiff,

vs.

Maria Amacker et al.,  
Defendants.

Action at law. Ejectment. Opinion filed Nov. 14, 1892.  
F. M. Dudley, W. E. Cullen, for plaintiff; Thos. C. Bach, Massena Bullard, for defendants.

This is an action in the nature of ejectment, brought by plaintiff to recover from defendants the possession of the south half of the northwest quarter of section seventeen, in township ten (10) north, range three, west of the principal meridian of Montana. Plaintiff alleges that it is the owner in fee simple of said land; that defendants have ousted and ejected it therefrom, and withhold the possession thereof from it.

Defendants in their answer deny the allegation of ownership of said lands set forth in the complaint and those concerning the ouster of plaintiff, but admit that they are in possession of the same and are holding the same against plaintiff. The evidence in this case fully establishes as a fact that plaintiff received from the United States, in 1864, a grant of all odd sections of public, and not mineral, to the amount of twenty odd sections per mile on each side of said plaintiff's railroad line which it should establish through the territory of Montana, and whenever the United States should have full title to the same, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; that plaintiff accepted the grant, and constructed the road named in the act making the same; that the land in dispute is an odd section within forty miles of the definite line of said road fixed as required by said act.

In October, 1868, one William M. Scott, it appears, filed in the United States Land Office at Helena, Montana, his declaratory statement to the effect that it was his intention to claim the said tract of land as a pre-emption right, under the provisions of the act of Congress of September, 1841. In 1869, he built a cabin on the same, and lived there until the fall of that year, when he left the same

and moved to the city or town of Helena, where he lived until in 1878, when he removed to Butte, Montana. He never returned to said land after leaving the same, and never subsequently exercised any acts of ownership over the same. Helena is but a short distance from where this land is situate, less than three miles.

On May 3, 1872, Wm. McLean, filed an application in the United States Land Office at Helena, Montana, to enter the same as a part of his homestead claim. It does not appear as to whether or not he ever resided upon said land or ever made any improvements upon the same. On December 1, 1864, the Commissioner of the General Land Office wrote to the Register and Receiver of the United States Land Office at Helena, Montana, informing them that this homestead entry of McLean's, with others, was held for cancellation, on the ground that the same was made subsequent to the time at which the right of the Northern Pacific Railroad Company attached to the same, as a part of an odd section within their grant, and directing them to serve notice upon McLean to show cause why it should not be cancelled. It appears that the general route of the Northern Pacific Railroad opposite to the land in dispute was located about February 1, 1872. Whether any notice was served, or anything further done at that time, does not appear.

On the 3d day of July, 1879, the Register and Receiver of the said Helena Land Office, the same being J. H. Moe and F. P. Sterling, respectively, wrote to the Commissioner of the General Land Office the following letter :

"We have the honor to report that June 2d, 1879, the applicants to the following homestead entries were duly notified in accordance with your circular of December 20th, 1873, to show cause within thirty days from date of said notice why their entries should not be cancelled, and up to this date no action has been taken \*

\* \* \* No. 819, William McLean, W.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  and S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$  of sec. 17, 10 N., 3 W., made May 3d, 1872. We would respectfully recommend that these homestead entries be cancelled."

On Sept. 11th, 1879, the acting commissioner of the general land office wrote to the register and receiver of the Helena Land office the following official letter :

"I am in receipt of your letters of June 4th and July 3d last, stating that the applicants in the following homestead entries were duly notified in accordance with the circular of December 20th, 1873, to show cause why their entries should not be cancelled, and that no action had been taken by them, and recommending for cancellation the said entries, viz : \* \* \* \* No. 819, made May 3d, 1872, by William McLean, W.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  and S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$ , sec. 17, 10, N. R. 3 W. \* \* In view of

the fact that the above entries were held for cancellation in Nov. and Dec., 1874, and of the further facts that the parties have allowed the limitation provided by statute to expire without making final proof as required, and have failed to establish their claims after due notice given, the said entries are hereby cancelled." The inference from these letters is that, as a fact, there had been no cancellation of McLean's entry until this letter of September 11th.

On July 2, 1882, the definite route of plaintiff's road was fixed opposite to where this land was located, and a plat thereof filed with the Commissioner of the General land office.

In August, 1882, William McLean died. On or about the 15th day of March, 1883, Maria McLean, as the widow of William McLean, made her application to enter said land, stating in the same that she applies to perfect the said homestead entry made by her husband on the 3d day of May, 1872, and that her claim thereto is based upon the second section of the act of Congress approved June 15, 1880, and section 2291, of the revised statutes of the United States. Plaintiff contested this application. On the 20th day of February, 1885, the Commissioner of the General Land Office sustained the application of the said Maria McLean. Plaintiff appealed from this decision to the Secretary of the Interior. On March 28, 1887, H. L. Muldrow, as acting Secretary of said department, affirmed the decision of the Commissioner of the General Land Office, and the application of Maria McLean was again sustained, and a patent to said land awarded her.

The provisions of the United States considered in deciding this question are as follows:

Act of April 21, 1876. "That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto."

"Section 2. That when at the time of such withdrawal as aforesaid valid pre-emption or homestead claims existed upon any lands within the limits of any such grants which afterwards were abandoned, and under the decisions and rulings of the Land Department were re-entered by pre-emption or homestead claimants who

have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto."

See Supplement to the Revised Statutes of the United States, page 99.

Sec. 3 of said act refers to entries made subsequent to the expiration of a land grant, and has no reference to any such question as is presented in this case.

The notice of the withdrawal of the lands at the time of the fixing of the general route of plaintiff's road, from sale, entry or pre-emption, by the Commissioner of the General Land Office, was filed in the local land office at Helena, Montana, on May 6, 1872.

Sec. 2 of act of 1880 is as follows:

"That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price: provided, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws."

21 U. S. Stat., 233.

Under the issues presented in this case the burden of proof was cast upon plaintiff, and it must rely on the strength of its own title. The grant to the Northern Pacific Railroad Company was one *in presenti*, and conveyed to it the legal title to all odd sections of public land not mineral on each side of the line of its road, as definitely fixed, to the extent of twenty sections in Montana, it then being a territory, or in all forty sections per mile, whenever the United States should have full title thereto, and they were not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claim or right at the time the route of its road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office. Until the road was thus definitely fixed the grant was in the nature of a float, then it received precision and became attached to certain and specific land, as of the date of the grant.

St. Paul and Pacific R. R. Co. vs. Northern Pac. R. R. Co., 139 U. S., 1.

Desert Salt Company vs. Tarpey, 142 U. S., 241.

Wisconsin R. R. Co. vs. Price County, 133 U. S., 496.

If at the time of the fixing of the definite route of plaintiff's road it transpired that any portion of the odd sections on each side of its road as above described was in such a condition that the United States did not have full title to the same, or the government had reserved, sold, granted or otherwise appropriated them, or they were not free from pre-emption or other claims or rights, they did not pass to plaintiff in its grant, and it was entitled to others, as provided by law, in lieu thereof.

The ruling of the Commissioner of the General Land Office, or the Secretary of the Interior, did not determine any right of plaintiff to the land in dispute. The ruling of the Land Department does not determine the right to or ownership of land when the government has parted with the same, but only as to whether the government should issue or not a patent to the land claimed by the applicant.

Nor. Pac. R. R. Co. vs. F. E. Wright. Fed. Rep.

The Court is therefore called upon to determine the question as to whether the land did or did not pass to plaintiff in its grant.

It is claimed that by virtue of section six of the said act making the grant to plaintiff the odd sections of public land, which include the land in dispute, on each side of the general route of plaintiff's road to the extent of twenty, were withdrawn at the date of the fixing of such general route from entry, sale and pre-emption. The general route of plaintiff's road, as we have seen, was fixed on February 21, 1872. Admitting this to be true, and it becomes necessary to inquire what was the status of this land at that time. Scott had filed his application to pre-empt the same, but he left it in 1869, and never returned thereto, or afterward made any claim thereto. In order that a party should have the benefit of the pre-emption laws it must appear that his residence on the land claimed was both continuous and personal.

Bohall vs. Della, 114 U. S., 47.

The pre-emption laws give a right of purchase of land from the United States, and a preference to persons who have complied with their terms over other claimants.

Frishe vs. Whitney, 9 Wall., 187.

The Yosemite Case, 15 Wall., 77.

It is not a vested interest in land. This right may be abandoned. Whenever a person leaves property of which he is pos-



sessed, without any intention of reclaiming the same again, he abandons it.

Richards vs. McNulty, 24 Cal., 339.

Judson vs. Mallory, 40 C., 299.

A right may be abandoned as well as property.

Am. and Eng. Encyclopadia of Law. Vol. 1, title Abandonment.

The leaving of said land by Scott, the failure in any way to comply with the pre-emption laws after leaving the same, his removing to the town of Helena, but a short distance from the land, and remaining there following his vocation as a plasterer for nine years, and then his removing to Butte City, Montana, and making that his residence up to the date of trial, must be considered as an abandonment by Scott of all right he had under the pre-emption laws to a preference in purchasing said land he had acquired by his filing his application to purchase the same, and his residence thereon. What Scott's intention was may be shown by circumstances. The circumstances, I think, show that his intention was to relinquish whatever rights he had to pre-empt this land. When did this intention take place? At the time he left the land, must be the answer. He left the land, and his subsequent conduct shows he had no intention of returning to it. There is no fact which would have any tendency to show that this intention took possession of him at any other time than when he left it. If the land was withdrawn from market by virtue of said section six, the law withdrew the same, and not the order of the Secretary of the Interior. There are several decisions of the Federal Courts that hold, in view of the above interpretation of the said section six, that the application of McLean to enter as a homestead said land at the time he did was a nullity. About the time, however, of the location of the general route of plaintiff's road there were rendered several decisions of the Land Department to the effect that the land was not withdrawn from market until the filing of a map of such route in the local land offices in the States and Territories through which such route lay. Then it was that the local offices had notice of the fixing of the general route. Under this ruling the filing of the application of McLean was in time. With a view of relieving men who had filed under this ruling, the act of April 21st, 1876, was passed, and, according to my view, corrected any error in that respect.

There was another view under which that law would have cured any defect in McLean's filing. By virtue of certain other rulings of the Land Department it was held, if there existed a pre-emption application on file at the time of the filing of the map of the general route with the Commissioner of the Land Office, or Secretary of the Interior, the land did not pass to the plaintiff, but was

excluded from its grant. I believe the reasoning which resulted in this ruling was based upon the view that the provisions of the act which excludes certain lands from the grant of plaintiffs which were in a certain condition at the time of the definite fixing of plaintiff's road, applied to the fixing of the general route of its road. If Scott's claim was a subsisting one at the time of the fixing of the general route of plaintiff's, under this ruling it did not pass to plaintiff. In view of this ruling, the 2d section of the said act of 1876 was passed. With this view of the law the ruling of acting Secretary of the Interior in considering the application of Mrs. McLean, now Maria Amacker was correct, if she could be subrogated to the rights of her husband McLean under the law of June 15th, 1880, for the land, not passing to plaintiff, was subject to entry. The Secretary was not confronted with the fact of the abandonment of Scott before this general route was fixed. The intention of Congress was to validate all pre-emption and homestead entries made under these rulings of the Land Department, whether erroneous or not, where the applicants complied with the pre-emption and homestead laws. If section six bears the construction which the Land Department has given the same, as well as some courts, it should be considered as modified by this act of 1876.

Under the view which this court has held of the provisions of said section six of the grant to plaintiff, McLean's application was valid.

In the case of Northern Pacific R. R. Co. vs. Sanders et al., 46 Fed. Rep., 239, and Id., 47 Fed. Rep., 604, this court held that the effect of section six of said act was not to withdraw any lands from sale, entry or pre-emption at the time of the filing of the plat of the general route of plaintiff's road. The language is that the lands hereby granted, that is by the act in which said section is found, shall be reserved from sale, entry and pre-emption.

In the case of Barney et al. vs. Winona and St. Peter R. R. Co., 117 U. S., 228, the Supreme Court, in considering a similar grant, defined the term "granted lands," and said, "they are those falling within limits specially designated, and *the title to which attached* when the lands are located by an approved and accepted survey of the line of the road, filed in the Land Department as of the date of the act of Congress."

In several cases the Supreme Court has held that the title attaches only when the route of the road is definitely fixed.

St. Paul and Pacific R. R. Co. vs. Nor. Pac. R. R. Co.,  
supra.

Desert Salt Co. vs. Tarpey, supra.

Wisconsin R. R. Co. vs. Price County, supra.

The granted lands had not then been designated and made known at the time of the location of the general route of plaintiff's road, and not until the location of the definite route thereof. I do not see then, how they could be reserved from sale, entry and pre-emption, until the definite route of said road was fixed and they became known. The view that unknown and undescribed lands can be withdrawn from sale, entry or pre-emption, does not seem to me possible. I know it is sometimes claimed that the general route should be substantially the same as the fixed route. There is nothing in the law which requires this, and as a matter of fact this is not at all places the same, even substantially.

There is one matter for consideration in considering when the local land office had notice of the withdrawal of the lands along the general route of plaintiff's road. If they were withdrawn by law, then there was notice of this law, when approved by the President.

But I do not think that the above act of 1876 had this in mind. It was endeavoring to make valid entries made under rulings of the Land Department, and the notice referred to was the one given by the General Land Office to the local offices.

In any view, except under the provisions of section 2, of the act of 1876, the filing of McLean was a valid one, and it was not valid under that section on account of the abandonment of Scott of his rights before the filing of the plat of the general route of plaintiff's road. McLean could have legally perfected his title, according to my view. He did not do this. There is nothing to show that he resided on the same, or in any way complied with the pre-emption laws. In accordance with the rules of the Land Department, notice was served on him that he should within thirty days show cause why his entry should not be cancelled. He failed to show cause, and on the 11th day of September, as before stated, his entry was cancelled, because he had not complied with the law in making proper proofs.

It was urged by defendants in the argument of this cause, that it did not appear that proper notice was given to McLean. The Register and Receiver in their letter of July 3d, 1879, recite that McLean had among others received due notice in accordance with the circular of the Commissioner of the General Land Office to show cause why his entry should not be held for cancellation. In the letter of Sept. 11th, 1879, the Commissioner of the General Land Office recites that due notice was given McLean. My attention was not called to any law providing for preserving these notices, or the manner of the service thereof. I think under these circumstances this comes within the rule expressed by the Supreme Court, in the case of *Cofield vs. McClelland*, 16 Wall., 331. In that case the court was considered a statute of the territory of Colorado that



required a probate judge should give a certain notice of the entry of a townsite, under the act of Congress. There was a failure of proof as to this notice, and in regard to the matter the court said: "We think this is a case in which the presumption applies that the officer has done his duty, especially as no provision was made in the act for procuring evidence that notice had been published. The case comes within the rule so well settled in this court that the legal presumption is that the surveyor, register, governor and secretary of state have done their duty in regard to the several acts to be done by them in granting lands, and therefore surveys and patents are always received as *prima facie* evidence of correctness."

What was the effect of the cancellation of McLean's entry? In the case of *Gallagher vs. Cadwell*, 145 U. S. 368, the Supreme Court said of the cancellation of a homestead entry under circumstances almost identical with the one at bar :

"At that time, and by that act all her rights of every kind and nature were ended and the land was fully restored to the public domain free for occupation and purchase by any other citizen as though there never had been any semblance of occupation or entry."

Taking this rule and applying it to this case we find that the land in dispute was, on the 15th day of June, 1880, when the act above recited was passed, as free for occupation and purchase as though there had never been the entry of McLean attached thereto. What was the effect of that act? It did not grant to McLean any interest in the land in dispute. It did not amount to a sale or an entry of the land. He had the privilege to enter the land until the rights of others attached thereto. He certainly could not wait indefinitely before exercising this privilege or right. He did nothing toward exercising this right for over two years, and died without making any move to exercise this privilege after the same was given him by that act. This privilege was not a claim upon the land. In the case of the *Northern Pacific R. R. Co. vs. Sanders et al.*, supra, this court took occasion to consider to a limited extent the term claim as used in the grant to plaintiff, and then said: "I would not say that every assertion of title to land would be entitled to the term claim. Perhaps acts sufficient should accompany the assertion of title to entitle the claimant to a standing in a court of justice to contest the right to the possession of the premises."

The mere privilege to enter land unaccompanied by any acts, if treated as a claim would incumber all the public domain subject to entry and pre-emption to a claim, for every citizen has the privilege of entering or pre-empting the same. By virtue of the act itself under which defendants claim this privilege of entry or purchase of the land concerning which this privilege or right was given was subject to entry as a homestead by any qualified citizen at any time

before this right was exercised. Certainly then the intention of Congress was not to incumber this land with a claim in favor of McLean. It is urged however that the provision of the statute making the grant to plaintiff is that the land which passes to it must be free from any right as well as any claim, at the time of the definite fixing of its road. The term right as here used does not appear to me to be very definite, and its legal meaning not altogether certain. It will be observed that the land must be free from this right. There is a difference between a right which is given an individual, and a right attached to land. Bouvier in his Law Dictionary defines right to be "a well founded claim."

In the case of *Newkirk vs. Newkirk*, 2 Caines R. 345, the court said: "Right is equivalent to all right." Right and estate are synonymous, at least in wills with each other.

In *Rapalje & Lawrence Law Dictionary*, in defining 'right' said of it: "Right to bring an action for possession of land given the owner." In some states the action to recover the possession of land is termed the action of right. In such an action the plaintiff claims some estate in the land which is the subject of the action which entitled him to the possession thereof. I feel confident that the right mentioned in plaintiff's grant was some estate in land and not a privilege which pertained to the individual, and I cannot think that the said act of 1880 gave to McLean any right in the land. If so, it was in some way a grant to some estate in the land. Such, I am sure, was not the intention of Congress in passing that act. If an estate in the land, would it pass to his heirs or administrator? How would it be subject to distribution? The suggestion of such questions show that certainly no estate of any kind was granted to McLean in the land.

There is one other point presented in considering that statute. It is very doubtful as to whether any right or privilege was given to Mrs. McLean thereunder. The widow is not named therein as a beneficiary. In the case of *Calliher vs. Cadwell*, *supra*, when considering this statute, the Supreme Court said:

"And the argument is worthy of consideration that because in some acts of Congress she is specially named as entitled to rights originally vested in her husband, and the omission to specify her in the act in question was an intentional exclusion of her from the privileges named, and that Congress did not intend to grant to others than the homesteader and the persons holding under him by instrument in writing any rights by reason of his incompleting homestead entry."

In support of this view the Court cites *Sutherland on Statutory Construction*, Sec. 327, and cases cited. In looking at that section we find this language:

“Where a statute enumerates the persons or things to be affected by its provisions there is an implied exclusion of others; there is a natural inference that its application is not intended to be general.”

While the Court in that case rested its decision upon the ground of laches, still all the way through the same it treats the fact that the widow was not named in the statute of 1880 as an important one in the consideration of the case. I do not see how the provision of the Revised Statutes of the United States can be considered a supplement to that of 1880 above named. That statute applies to another directly. The said statute of 1880 does not purport in any way to supplant or take the place of any part of said section. It is an independent statute by itself. While in *pari materia* with the other statutes for the disposal by general laws of the public domain, and to be construed with them, there is nothing which will warrant a court in taking a clause of one statute which applies to a particular subject and condition, and make it apply to a totally distinct statute.

But allowing that part of said section which gives the privilege to a widow to complete the homestead entry of her husband applies, and can it be said that it conveys any estate to her in the land, any interest in it whatever? We have *seen* the land became public domain free to any citizen to occupy and pre-empt, or enter the same upon the cancellation of McLean's entry. Considering then all of these statutes, and it does not appear to me that the land in dispute was such as the United States had full title to not reserved, sold, granted or otherwise appropriated and free from any pre-emption or other claim or right, at the time when the definite route of plaintiff's road was fixed and a map thereof filed in the office of the Commissioner of the General Land Office. By the terms of the grant, it then passed to plaintiff, neither McLean or his widow had then exercised the privilege granted them, if any was granted to the latter, by the act of 1880. The rights granted to McLean by the act of 1876 above referred to was lost by his failure to comply with the statute that required his final proofs to be made within a certain time, and the cancellation of his entry in 1879.

Considering, as I have steadily maintained we should, the condition of the land at the time the definite line of plaintiff's road was fixed, and the grant to it received precision, I cannot see how I can reach any other conclusion then, than that plaintiff is the owner of the land in dispute.

*I therefore find that the plaintiff is the owner of the land described in the complaint herein, and entitled to the possession thereof.*

*That defendants are in possession of the same without its consent, and wrongfully.*

*It is therefore ordered that judgment be entered in this case in favor of plaintiff, and against defendants for the possession of the land described in the complaint, and for its costs of suit.*

And thereafter, to-wit, on the 14th day of November, 1892, the following further proceedings were had and entered of record herein, in the words and figures following :

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker et al.

On motion of counsel for defendants and by consent of counsel for plaintiff, defendants are hereby granted a stay of execution pending the preparation and filing of bond on writ of error; and it is further ordered that defendants have thirty days in which to prepare and file a bill of exceptions herein, and that said defendants have until said bill of exceptions is filed herein to file findings, and that the bond herein be fixed during this term of court.

And thereafter, to-wit, on the 6th day of December, 1892, defendants filed their bill of exceptions herein, which said bill of exceptions as filed, is in the words and figures following, to-wit :

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Northern Pacific Railroad Company,	} Plaintiff.
vs.	
Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert,	} Defendants.

Bill of Exceptions.

*Be it remembered*, that this cause coming on for trial on the 23d day of May, 1892, one of the days of the April term of the above Court, and before the trial a stipulation in writing, signed by the attorneys for the parties both plaintiff and defendants having been filed in open Court, whereupon said cause was called for trial before the Court sitting without a jury, a trial by jury having been expressly waived by the stipulation aforesaid, and the pleadings having been read to the Court, the plaintiff, to maintain the issues on its part, introduced the following testimony :

The plaintiff offered evidence showing acceptance by the plaintiff of the grant of lands to it made by the United States of America by an act of Congress entitled "An act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," approved July 2nd, 1864.

The plaintiff's testimony further tended to show that the land in controversy herein is agricultural in character.

The plaintiff next offered in evidence a certified copy of the map of the General Route of plaintiff's road for the purpose of showing that the lands in controversy were within forty miles of the line of said route.

The plaintiff then offered in evidence a certified copy of the order of withdrawal made after the filing of the map of general route by the Commissioner of the General Land Office and the date of filing said order of withdrawal in the local land office of the United States at Helena, Montana—the land in controversy being within the district of lands subject to sale at said local land office, which order, the date thereof and the date of its receipt at the local office being as follows :

DEPARTMENT OF THE INTERIOR,        }  
GENERAL LAND OFFICE, April 22, 1872. }

*Register and Receiver, Helena, Montana :*

GENTLEMEN—I transmit herewith diagram showing the designated route of the Northern Pacific Railroad, under the act of July 2nd, 1864, and by direction of the Secretary of the Interior you are hereby directed to withhold from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed *odd* numbered sections of public lands falling within the limits of forty miles as designated on this map.

You will also increase in price to \$2.50 per acre the even numbered sections within these limits, and dispose of them at that ratable, and under the pre-emption laws only. No private entry of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

WILLIS DRUMMOND,

Commissioner.

The plaintiff then offered evidence tending to show that the map of definite route mentioned in said act was filed in the office of



the Commissioner of the General Land Office at Washington, D. C., on July 6, 1882, and in said local land office at Helena, Montana, on June, 21, 1883, and that the land in controversy was within the forty mile limit as shown by each of said maps, and within two miles of the line of said road, and is situated within the district of lands belonging to the United States of America, and subject to sale at the said local land office at Helena, Montana.

The plaintiff then offered evidence to show the acceptance of its road by the Commissioners appointed for that purpose under the act of Congress aforesaid.

George M. Borquin, being duly sworn as a witness for the plaintiff, upon his direct examination testified that he is the Receiver of the United States Land Office at Helena, Montana. The testimony of said witness tended to show that an official book called the tract book kept in said office would show the entries filed of record in said land office upon any tract of land within the district of lands subject to sale at said office.

Counsel for plaintiff then offered in evidence a certified copy of the tract book showing entries as follows—being all the entries of the premises in dispute, to-wit :

“Section 17. S.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  S. W.  $\frac{1}{4}$ . Oct. 5, 1868, Wm. M. Scott, D. S. No. 179,” being the entry based upon the declaratory statement hereinafter referred to.

“S.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$ . Oct., 1868. Oct. 20, 1869, Wm. M. Scott, D. S. No. 719. See Sec. 8 (amendatory of D. S. No. 179).”

~~“H. E. W.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  and S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$ .”~~  
(Cancelled as per Commissioner’s letter “F” of Sept. 11, 1879.)

Sec. 17, Township No. 10, N. Range No. 3 West, 160 acres, \$1.25 per acre, purchase money \$16.00. Wm. H. McLean, May 3, 1872. No. of receipt and certificate of purchase, 819.”

Counsel for defendants objected to so much of the paper offered in evidence as reads, “Cancelled as per Commissioner’s letter ‘F’ of Sept. 11, 1879,” for the reasons :

1st. That the letter itself would be the best evidence.

2d. Because it does not appear that McLean received any notice to appear and protect his right before the department.

Which objection was by the Court then and there overruled, and said paper was admitted in evidence.

To which ruling of the Court in allowing so much of the entry as reads “Cancelled, as per Commissioner’s letter ‘F’ of Sept. 11th,

1879" in evidence, Counsel for the defendants then and there excepted.

Plaintiff then offered in evidence a certified copy of a letter dated July 3d, 1879, signed by the Register and Receiver of the United States Land Office at Helena, Montana, and addressed to the Honorable Commissioner General Land Office, Washington, D. C., for the purpose of showing that McLean had been duly notified to appear and show cause why his entry should not be cancelled, the defendant Maria Amacker having been required to produce the notice mentioned in said letter, and having failed to find any such paper among the papers of her late husband, William McLean, which said letter is as follows, to-wit :

UNITED STATES LAND OFFICE, ( )  
HELENA, MONTANA, July 3, 1879. ( )

*Hon. Com. Gen'l Land Office, Washington, D. C.*

SIR:—We have the honor to report that June 2d, 1879, the applicants to the following homestead entries were duly notified in accordance with your circular of December 20th, 1873, to show cause within thirty days, from date of said notice, why their entries should not be cancelled, and up to this date no action has been taken.

\* \* \* \* \*  
No. 819, William McLean, W.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$ , and S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$ , Sec. 17, 10 N., 3 W., made May 3, 1872.  
\* \* \* \* \*

We would respectfully recommend that these homestead entries be cancelled.

Very respectfully,

J. H. MOE, Register.

F. P. STERLING, Receiver.

To which evidence and offer counsel for the defendants objected, for the reason that it does not appear what notification was given to McLean, and that the letter simply states as a conclusion of law that Mr. McLean was duly notified—what notice was given not being stated.

The objection was by the Court overruled, and the said letter admitted in evidence, to which ruling of the Court, admitting the said letter in evidence, counsel for the defendants then and there excepted.

Counsel for plaintiff then offered in evidence a letter signed by the Commissioner of the General Land Office, at Washington, D. C., and addressed to the Register and Receiver of the United

States Land Office at Helena, Montana, dated September 11, 1879, cancelling the homestead entry of William H. McLean, which letter is as follows, to-wit :

F. O. 24,576.  
O. 31,284.

Sept. 11, 1879,

*Register and Receiver, Helena, Montana T.:*

GENTLEMEN—I am in receipt of your letters of June 4th and July 3d last, stating that the applicants in the following homestead entries were duly notified in accordance with the circular of Dec. 20, 1873, to show cause why their entries should not be cancelled, and that no action has been taken by them, and recommending the cancellation of said entries, viz :

*	*	*	*	*	*	*
No. 819, made May 3, 1872, by William McLean, W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ , S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ , S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ 17, 30 N., 3 W.						
*	*	*	*	*	*	*

In view of the fact that the above entries were held for cancellation in Nov. and Dec., 1874, and of the further facts that the parties have allowed the limitation provided by statute to expire without making final proof as required, and have failed to establish their claims after due notice given, the said entries are hereby cancelled.

*	*	*	*	*	*	*
---	---	---	---	---	---	---

Advise the parties in interest.

Very respectfully,

J. M. ARMSTRONG,

Acting Commissioner.

To which offer and evidence, counsel for the defendants objected, for the reason that it is incompetent and immaterial, and for the further reason that it does not appear that McLean was ever notified of the action of the department, or to appear and show cause why his entry should not be cancelled.

The objection was by the Court overruled, and the said letter admitted in evidence.

To which ruling of the Court, admitting said letter in evidence, Counsel for the defendants then and there excepted.

*William M. Scott* was then called as a witness on behalf of the plaintiff, and having been duly sworn, testified upon his direct examination that he now resides in Butte City, Montana.



And upon the examination of the said witness, Counsel for plaintiff asked the following questions:

Q. Will you examine this paper (handing to witness a certified copy of a Pre-emption Declaratory Statement, dated October 5, 1868, made by him in the United States Land Office at Helena, Montana, for the S.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  S. W.  $\frac{1}{4}$ , Section 17, Tp. 10 N., R. 3 W., being the filing, the record of which appears in the Tract Book hereinbefore mentioned)? I will ask you if you are the Mr. Scott mentioned in this paper?

A. Yes sir.

Q. You settled on this land Oct. 5th, 1868, the S.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  Sec. 17.

A. I did. I built a house on it in the spring of 1869 and moved on to it.

Q. When did you leave it, if at all.

To which question counsel for the defendants objected as being immaterial and incompetent, for the reason that the filing appears of record and valid on its face, no abandonment having been filed.

The objection was by the Court overruled, to which ruling counsel for the defendants then and there excepted.

The answer of the witness was as follows :

A. I left it in the fall of 1869.

Q. Did you afterwards return to the land?

To which question counsel for defendants objected as being incompetent and immaterial because the filing appears of record, uncanceled, and valid on its face, no abandonment ever having been filed.

The objection was by the Court overruled, to which ruling counsel for defendants then and there excepted.

The answer of the witness was as follows :

A. No Sir.

Plaintiff then offered in evidence the declaratory statement referred to, certified by the Receiver of the Land Office to be correct, which declaratory statement is as follows :

DECLARATORY STATEMENT FOR CASES WHERE THE LAND IS NOT  
SUBJECT TO PRIVATE ENTRY.

I, William M. Scott, of Lewis and Clarke County, M. T., being the head of a family, and a native born citizen of the United States,

have on the 5th day of October, A. D. 1868, settled and improved the south half of the northwest quarter, and the north half of the south west quarter (S.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ ) of section No. 17 in township No. ten (10) north of Range No. three (3) west, in the district of lands subject to sale at the Land Office at Helena, Montana Territory, and containing one hundred and sixty acres, which land has not been offered at public sale, and thus rendered subject to private entry; and I do hereby declare my intention to claim said tract of land as a pre-emption right, under the provisions of act of 4th September, 1841.

Given under my hand this fifth day of October, A. D. 1868.

WILLIAM M. SCOTT.

In presence of GEO. W. STOREY.

Mr. Geo. M. Bourquin was then recalled as a witness on behalf of the plaintiff, and having been duly sworn testified as follows:

Q. Mr. Bourquin will you please state the method of issuing an order to show cause why an entry should not be cancelled in the land office, and whether you are able to keep copies of such notices in the land office, and if not, why not?

A. When the time arrives that notice should be given, we issue a notice on a printed blank. The form is printed and we fill in the names of the different entrymen, and this sent to the parties by registered mail, no copy being retained in the office. No copies are preserved. I believe you asked me for a copy of notice of cancellation, cancelling the entry of—to produce certified copy of letter sent to Wm. McLean, dated June 2, 1879, directing him to show cause within thirty days whether his homestead entry for this land should not be cancelled, and I made a thorough search and satisfied myself it was not of record.

On cross-examination the witness testified as follows:

“I do not know that any such notice was ever sent out of my office. I would only know what the records show. I have never seen any such record: and I do not know what the custom of the Department was with my predecessors. When the paper is sent out by registered mail we receive a receipt, and send it to the Department as evidence that the notice has been served. The letter transmitting it is the only record we have. We make no other entry.

#### PLAINTIFF RESTS.

Mr. Walter H. Little was then called as a witness on behalf of the defendants, and having been duly sworn testified that he is a real estate broker; that he is acquainted with the value of the land

in controversy here; and that its value is about \$260 or \$300 per acre, or between \$20,000 and \$24,000.

Mrs. Maria Amacker was then called as a witness on behalf of the defendants, and being sworn, testified as follows:

“My name is Maria Amacker. I was once Maria McLean, the wife of William H. McLean—the one who filed a homestead entry on this land. He died in 1882. I afterward applied for a patent to the premises in dispute; and received a patent to the premises.”

The patent from the United States of America to Maria McLean, widow of William H. McLean, deceased, for the W.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ , Sec. 17, Tp. 10 N., R. 3 W, was then introduced in evidence, which patent is as follows, to-wit :

The United States of America.

Certificate {  
No. 1133. }

*To all Whom these Presents Shall Come*—GREETING :

WHEREAS: Maria McLean, widow of Wm. H. McLean, deceased, of Lewis and Clarke County, Montana Territory, has deposited in the General Land Office of the United States, a certificate of the Register of the Land Office at Helena, Montana Territory, whereby it appears that full payment has been made by the said Maria McLean according to the provisions of the act of Congress of the 24th of April, 1820, entitled “An act making further provision for the sale of public lands,” and the acts supplemental thereto, for the west half of the northwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section seventeen, in township ten, north of range three, west of Montana meridian, in Montana Territory, containing one hundred and sixty acres, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Maria McLean.

Now KNOW YE, That the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, *have given and granted*, and by these presents *do give and grant* unto the said Maria McLean and to her heirs, the said tract above described,

*To Have and to Hold* the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said Maria McLean and to her heirs and assigns forever; subject to any vested and accrued water rights

for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts, and also subject to the rights of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

IN TESTIMONY WHEREOF, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the seventeenth day of June, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

By the President, GROVER CLEVELAND.

By M. McKEAN, Secretary.

ROBT. W. ROSS, Recorder of the General Land Office.

It was then admitted by counsel for the plaintiff that the defendants other than Maria McLean are in possession of the land in dispute as tenants under this patent, or as having obtained title through conveyances from the grantee named in the patent, and that their title is of the same quality. Counsel for defendants then introduced in evidence certified copies of the homestead application of William McLean, and all the papers connected with it, for land including the land in dispute—being all the papers required in making a homestead entry, and being the papers upon which the entry introduced in evidence by plaintiff was based.

Counsel for defendants next introduced in evidence a certified copy of the application of Maria McLean, widow of William H. McLean deceased, to purchase the W.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  Sec. 17, Tp. 10 N. R. three west, which application is as follows, to-wit :

U. S. LAND OFFICE, )  
HELENA, MONTANA, T. (

I. Maria McLean, the widow of William H. McLean, deceased, who on the 3d day of May, A. D. 1872, made homestead entry No. 819 for the W.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ , the S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of Sec. 17 in Tp. 10 N. of R. 3 W. in Lewis and Clarke County, Montana Territory, containing one hundred and sixty acres and subject to entry in Helena, Montana Territory, do

hereby apply to perfect said entry, and my claim thereto, by virtue of the second section of the act of congress approved June 15th, 1880, and section 2291 of the revised statutes of the United States, and for that purpose do solemnly swear that I am the widow of said William McLean; that the said William McLean was a citizen of the United States; that neither he nor I have heretofore perfected or abandoned an entry made under the homestead laws of the United States; and I further swear that neither he nor I have assigned the right to receive the repayment of the fees and commissions paid thereon at the time of making said homestead entry No. 819; that said fees and commissions have not been repaid, and that no application for such repayment has been made.

MARIA McLEAN.

I, Francis Adkinson, Register of the Land Office at Helena, M. T., do hereby certify that the above affidavit was subscribed and sworn to before me this 15th day of March, A. D. 1883.

F. ADKINSON, Register.

Said application being accompanied by certified copies of a certificate of Frank P. Sterling, Probate Judge of the County of Lewis and Clarke, Territory of Montana, to the effect that Maria McLean is the widow of William H. McLean who made the homestead entry referred to; the certificate of the Register of the Land Office at Helena, Montana, certifying that Maria McLean had purchased the tract referred to; the Receiver's receipt for the purchase money paid for said tract and an affidavit of Maria McLean to the effect that the said tract is non-mineral in character.

Counsel for the defendants then introduced in evidence a certified copy of the decision of the commissioner of the General Land Office, holding for approval for patent the cash entry of Maria McLean of the lands in question, which decision is as follows, to-wit:

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE, WASHINGTON, D. C., }  
Feb. 20th, 1885.

*Register and Receiver, Helena, Montana Ter.*

GENTLEMEN—I have considered the cash entry of Maria McLean, widow of Wm. McLean, No. 1134, made March 15, 1883, under Sec. 2 of the act of June 15, 1880, (21 Stat. 237) on the W.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  and S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$  Sec. 17 T. 10 N. R. three West.

Said tracts are within the withdrawal of odd numbered sections for the benefit of the grant to the Northern Pacific Railroad Company, upon the map of general route of said Company's road filed in



this office Feb. 21st, 1872, ordered by letter from this office dated April 22, received at your office May 6th, 1872.

They are also within the forty mile (granted) limits of the definite located line of said company's road, the map of which was filed in this office, July 6, 1882.

The records show that the pre-emption declaratory statement covering said tracts were filed as follows :

No. 75, by A. J. Wetter, N. W.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$ , with other tracts, May 13, 1868, alleging settlement same day.

No. 179, by Wm. M. Scott, S.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$ , with other tracts, Oct. 5, 1868, alleging settlement same day, amended Oct. 20, 1869, still covering said S.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$ , and again amended Oct. 14, 1872, to No. 2807, excluding said tract.

No. 252, by Jerome S. Glick, S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$ , with other tracts, Nov. 27, 1868, alleging settlement the same day.

No. 776, by Robt. C. Wallace, S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$  with other tracts, Dec. 13, 1869, alleging settlement the same day.

May 3, 1872, Wm. McLean made homestead entry No. 819 on said W.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$ , and S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$ .

The letter directing the withdrawal of the lands for the grant stated that the order would take effect from the date of its receipt at your office.

March 22, 1873, the Secretary of the Interior decided (Copp L. L., 1875, p. 377) that the withdrawal took effect upon the filing and acceptance of the map of general route.

McLean's entry having been made after the filing of such map, was held for cancellation by this office Dec. 1, 1874, subject to appeal within sixty days.

No appeal was taken from this action. Under date July 3, 1879, the local officers reported that McLean had been duly notified pursuant to office circular of Dec. 20, 1873, to show cause within thirty days why his entry should not be cancelled for failure to make proof of compliance with law within the statutory period, and that he had taken no action in the matter, and recommended the cancellation of his entry. In view of the facts that the entry had been held for cancellation in 1874, and that McLean had allowed the statutory limit to expire without making the proof required, and had also failed to establish his claim after due notice, said entry was cancelled in this office Sept. 11, 1879, and you were so informed by letter of that date.

As shown by the certificate of the Probate Judge of Lewis and Clarke County, M. T., McLean died Aug. 20, 1882.

Mrs. McLean claims that her husband's entry was confirmed by Section One (1) of the Act of April 21, 1876: that in view of said fact the cancellation of said entry was error; and that, as his widow, she has the right to purchase under Section 2, of the Act of June 15, 1880, whereby payment of the piece of land is made equivalent to proof of compliance with the provisions of the Homestead laws.

Sec. 1 of the Act of April 21, 1876, provides that all pre-emption and homestead entries of the public lands, made in good faith by actual settlers upon tracts of not more than one hundred and sixty acres each, within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts, shall be confirmed and patents for the same shall be issued to the party entitled thereto.

Section 2 of the Act of June 15, 1880, provides that persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing may entitle themselves to said lands by paying the government price therefor, with credit for the amount already paid, with a further provision that this shall in no way interfere with the rights or claims of others who may have subsequently entered said lands under the homestead laws.

Counsel for the Railroad Company contends that the Act of 1876, confirms only such entries wherein the homestead laws have been complied with and proper proofs thereof have been made; that McLean never invoked the relief provided by said Act but allowed his claim to expire, and suffered it to be cancelled as heretofore stated, more than three years after the passage of said Act, without protest; that as the land had been withdrawn by legislative enactment before the entry was made, upon cancellation of the same the land became subject to the grant and the matter had become *res adjudicate* and other rights had attached at the time the Act of 1880 became a law; and that the right of the Company is held not only under the legislative withdrawal of 1872, but also under the definite location of its road in July, 1882.

This office has already decided that upon the death of a homestead entryman the right to purchase under the Act of 1880 descended to his widow. (See to R. and R. Taylor's Falls, Minn., May 21, 1883, 10 C. L. O. 90.) Also that cancellation of an entry is no bar to purchase under said Act. (Ex parte Mitchell 10 C. L. O. 36.)

It may be that the pre-emption claims herein mentioned subsisting at the date of filing the map of general route were sufficient

to except the land from the withdrawal, which it is now held took effect upon such filing, but beyond the mere fact that they were then of record there is no evidence of the validity of such claims.

The object of the Act of 1876 was to afford relief to persons who without a knowledge of the withdrawal had made entries on lands prior to receipt of notice of such withdrawal at the local office since, as in this case, where there was a prior legislative withdrawal, such entries could not have been perfected without such legislation. It is true the act required the proof of the compliance with the provisions of the homestead law should be made.

Upon the passage of the act of 1880, however, it became optional with a homestead entryman to make proof of such compliance or to purchase the land, and such payment is accepted in lieu of proof. (A. G. and W. U. T. Co. vs. Martin, 10 C. L. O., 329.)

McLean's homestead entry is clearly within the terms of the act of 1880, in lieu of making proof of the compliance with the provisions of the homestead laws as to residence and cultivation was not affected by the definite location of the company's road is, in my opinion, settled by the action of this office and the Department in the case of O'Dillon B. Whitford against said company. In that case Whitford had a homestead entry subsisting which excepted the land from the legislative withdrawal on general route. His entry was cancelled in 1879 for failure to make proof within the statutory period.

After the road had been definitely located he was allowed to purchase under the act of 1880. Dec. 1, 1883, his cash entry was considered in this office and held for approval for patent upon the ground that his homestead excepted the land from the withdrawal on general route and from the grant. This decision was affirmed by the Honorable Acting Secretary of the Interior on appeal, Jan. 7, 1885.

In the case at bar the act of 1876 took the land out of the withdrawal on general route, and prior to definite location of the road, the act of 1880 conferred upon the entryman a right to pay for the same in place of making proof as required prior to that time, which right, under the decision above cited, was not affected by the definite location of the road, and, upon his death, descended to his widow.

Mrs. McLean's cash entry of the land in question is accordingly held for approval for patent, subject to appeal by the railroad company within sixty days.

Notice of this action will be given the parties in interest through their resident attorneys by letters of even date herewith.

Very respectfully,

N. C. McFARLAND.

Commissioner.



Counsel for defendants then introduced in evidence a certified copy of the appeal by the Northern Pacific Railroad Company from the decision of the Commissioner of the General Land Office holding for approval for patent the cash entry of Maria McLean; together with the specifications of error on said appeal.

Counsel for the defendants next introduced in evidence a certified copy of the decision of the Acting Secretary of the Interior affirming the decision of the Commissioner of the General Land Office and sustaining the application of Maria McLean to purchase the premises in dispute, which division is as follows, to-wit :

DEPARTMENT OF THE INTERIOR, }  
WASHINGTON, March 28th, 1887. }

Northern Pacific R. R. Co.	}	Entry within limits of land grant prior to notice of withdrawal.
vs.		
Maria McLean.		

*The Commissioner of the Land Office.*

SIR—William McLean made homestead entry of the W.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  Sec. 17-T. 10 N. R. three west, Helena, Montana, May 3, 1872. This tract is within the limits of the withdrawal of the odd numbered sections for the benefit of the Northern Pacific Railroad Company, upon map of general route filed February 21st, 1872. The withdrawal was made February 21st, 1872, notice of which was received at the local office May 6th, 1872. It is also within the forty mile limit of said road, as fixed by the map of definite location, filed July 6, 1882.

The letter of withdrawal directed that it should take effect from the date of its receipt at the local office. Subsequently the Secretary decided that said withdrawal took effect upon the filing and acceptance of the map of general route. Whereupon on December 1st, 1873, McLean's entry was held for cancellation, subject to appeal, but no appeal was taken from said decision.

July 3, 1879, the local officers reported that McLean had been notified, pursuant to office circular of December 20, 1873, to show cause within thirty days why his entry should not be cancelled for failure to make proof of compliance with the law within the statutory period, and failing to respond to such notice, his entry was cancelled September 11, 1879, and no appeal was taken from that action.

McLean died the 20th day of August, 1882, and Maria McLean, his widow, on March 15, 1883, made application to purchase said tract under the act of June 15, 1880, upon the ground that her husband's entry being confirmed by the first section of the act of April 21, 1876 (19 Stat. 35.) that payment for the land under the

act of June 15, 1880, is equivalent to proof of compliance with the provisions of the homestead laws.

Your office awarded to Mrs. McLean the right to purchase, holding that under the act of June 15, 1880, it became optional with a homestead entryman, either to make proof of the compliance with the provisions of the homestead law, or to purchase the land, and that payment for the land is accepted in lieu of such proof, from which decision the company appealed. At the date of the withdrawal this tract was covered by the following pre-emption filings:

A. J. Wetter for the N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  with other tracts May 13, 1868, alleging settlement same day.

Wm. M. Scott S.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$  with other tracts Oct. 5, 1868, alleging settlement same day, amended Oct. 20, 1869, still covering said S.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$ , and again amended Oct. 14, 1872, to No. 2807, excluding said tract.

Jerome S. Glick S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  with other tracts November 27, 1868, alleging settlement same day.

Robert C. Wallace, S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  with other tracts December 13, 1869, alleging settlement same day.

Prior to the Act of July 14, 1870, no time had been prescribed within which pre-emptors were required to make proof and payment for their claims on unoffered lands, but that act provided that nothing in the act of March 27, 1854, "shall be construed to relieve settlers on lands reserved for railroad purposes from the obligation to file the proper notices of their claims, as in other cases, and all claimants of pre-emption right shall hereafter, when no shorter period of time is now prescribed by law, make proof and payment for the lands claimed within eighteen months after the date prescribed for filing their declaratory notices shall have expired."

The act of March 3, 1871, extended the time within which proof and payment shall be made one year; and this provision has since been in force and was subsequently incorporated in the Revised Statutes as section 2267, which provides that all claimants of pre-emption rights upon unoffered lands shall make proper proof and payment for the land claimed within thirty months after the date prescribed for filing their declaratory notices has expired.

It therefore appears that at the date of the withdrawal a pre-emption claim to the land in controversy was subsisting capable of being perfected, and hence this tract of land not being perfected by the withdrawal for the benefit of the road, the homestead entry of McLean was not controlled by the act of April 21, 1876.

In the case of the Northern Pacific Railroad Company vs. Burt (3 L. D., 490) the Department held that the widow of an entry-

man had the right to purchase under the act of June 15, 1880, although the entry had been cancelled for failure to make proof within the statutory period prior to the definite location of the road, and although the application to purchase was made subsequent thereto, following a long line of Departmental decisions. See also *Gilbert vs. Spearing* (4 L. D., 463), *Holmes vs. Northern Pacific Railroad Company* (5 L. D., 333).

Applying the rule to the case at bar, Mrs. McLean should be allowed to purchase, and for this reason I affirm your decision, and herewith transmit the papers.

Very respectfully,

H. L. MULDROW, Act'g Sec.

Counsel for the defendants then stated that the testimony on behalf of the defendants was closed, and the cause was thereupon submitted to the Court.

And now, the defendants by their counsel, pray that this, their bill of exceptions may be signed, sealed, allowed and made a part of the record in this cause, which is done accordingly this 14th day of December, A. D. 1892.

HIRAM KNOWLES, Judge

*To Messrs. F. M. Dudley and W. E. Cullen, Attorneys for Plff.:*

You will please take notice that the foregoing is a copy of the Bill of Exceptions proposed by the defendants in the above entitled cause.

MASSENA BULLARD and  
THOS. C. BACH,

Attorneys for Defendants.

Received a copy of the foregoing this 6th day of December, A. D. 1892, and service thereof is hereby admitted.

F. M. DUDLY and  
W. E. CULLEN,

Attorneys for Plaintiff.

Filed Dec. 6th, 1892.

GEO. W. SPROULE, Clerk.

And thereafter, to-wit, on the 14th day of December, 1892, the following further proceedings were had, and entered of record herein, in the words and figures following:

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker et al.

Defendants bill of exceptions as filed is this day in open Court duly signed and allowed.

It is ordered that the findings of fact herein be filed nunc pro tunc as and of date November 14, 1892, said order being made by consent of respective attorneys.

And thereupon said findings of fact were filed as of date, November 14, 1892, which said findings of fact so filed are in the words and figures following:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

Northern Pacific Railroad Company,  
 Plaintiff,

vs.

Maria Amacker, John J. Amacker, her  
 husband, George S. Howell, George  
 Gotthardt, Walter H. Little, Alexan-  
 der J. Steele, Frank H. Pings, John  
 Blank, Joseph Jordan, Herbert B.  
 Reed and George Dibert,  
 Defendants.

*Be it Remembered*, That this cause came on regularly for trial on the 23d day of May, 1892, before the Court sitting without a jury, a trial by jury having been expressly waived by a stipulation in writing signed and filed in open Court by the attorneys of all the parties plaintiff and defendants herein, before the trial was commenced: and witnesses having been examined and evidence having been introduced: and the cause having been argued by counsel for both plaintiff and defendants, the same was by the Court taken under advisement.

And now, upon this 14th day of November, 1892, one of the days of the November term of said Court, the Court hereby makes and files the following special findings of fact:

#### FINDINGS OF FACT.

First. That on the 2d day of July, 1864, the United States of America granted to the plaintiff herein, its successors and assigns, for the purpose of aiding in the construction of a railroad and telegraph line to the Pacific coast, and for other purposes, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the

time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office: and whenever, prior to said time, any of said sections or parts of said sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

And that it was provided in the Act of Congress by which the said grant was made "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad: and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company, as provided in this act: but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

2d. That plaintiff accepted the grant and constructed the road named in the act of Congress making the same.

3d. That the land in dispute is a part of an odd section within twenty miles of the definite line of said road, fixed as required by said act: and that the only title which plaintiff has or claims to have to said lands is under and by virtue of said act.

4th. That on the 21st day of February, 1872, plaintiff filed in the office of the Commissioner of the General Land Office its map of general route of said road; and that the premises in controversy were and are within twenty miles of the line of said route.

5th. That on the 6th day of May, 1872, the said map of general route of said road was received and filed in the United States District Land Office at Helena, Montana.

6th. That on the 6th day of July, 1882, the plaintiff filed in the office of the Commissioner of the General Land Office its map definitely fixing the line of said road.

7th. That on the 21st day of June, 1883, the said map definitely fixing the line of said road was received and filed in the United States Land Office at Helena, Montana.



8th. That on the 5th day of October, 1868, one William M. Scott filed in the United States Land Office at Helena, Montana, that being the land district within which said premises were then and now are situated, his pre-emption declaratory statement in writing under and in conformity with the provisions of the laws of the United States wherein and whereby he made pre-emption claim to said premises in controversy herein with other tracts, alleging settlement the same day.

9th. That said Land Office accepted and filed and entered the said declaratory statement; and that the same was duly and regularly noted upon the records thereof.

10th. That the said declaratory statement and filing is still of record in said Land Office, and has never been cancelled.

11th. That in the year 1869 the said Scott built a cabin on said premises and lived there until the fall of that year, when he moved to the city of Helena, Montana, and continued to live in Helena until the year 1878, when he removed to the city of Butte, Montana; that he never returned to said land after leaving it in the fall of 1869, and never exercised any act of ownership over the same, and on said date abandoned the same.

12th. That on the 3rd day of May, 1872, one, William McLean, duly applied, under the act of Congress approved May 20th, 1862, entitled "An Act to Secure Homesteads to Actual Settlers on the Public Domain," and the acts amendatory thereof, to enter the west half of the northwest quarter, southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of Section No. 17, Township No. ten north of Range No. three west, and was then and there permitted by the Register and Receiver of the said United States Land Office at Helena, Montana, to enter said land in controversy under and in accordance with the provisions of said act of Congress, and that thereupon said McLean did make an affidavit as required by Section 2290 of the Revised Statutes of the United States, and filed the same with the Register of the said Land Office, and his said entry was then and there entered upon the records of said office.

13th. That the premises which are the subject of this action were included in both the pre-emption filing of the said Scott and the homestead filing of the said McLean.

14th. That on the 1st day of December, 1874, the Commissioner of the General Land Office wrote to the Register and Receiver of the U. S. Land Office at Helena, Montana, that the said homestead entry of said McLean was held for cancellation for the reason that the same was made subsequent to the time at which the right of the Northern Pacific Railroad Company attached thereto.



15th. That on the 3rd day of July, 1879, the Register and Receiver of the United States Land Office at Helena, Montana, wrote to the Commissioner of the General Land Office that the said William McLean had been duly notified that his homestead entry was held for cancellation; that no action had been taken by him, and recommending the said entry for cancellation.

16th. That on the 11th day of September, 1879, the Commissioner of the General Land Office wrote to the Register and Receiver aforesaid informing them that the said homestead entry had accordingly been cancelled.

17th. That there was no cancellation of McLean's homestead entry until September 11, 1879.

18th. That said McLean died in August, 1882.

19th. That on the 15th day of March, 1883, Maria McLean, the widow of said McLean, as such widow, applied to the said Land Office at Helena, Montana, to purchase said tract, and to perfect her husband's entry thereof, under the act of Congress approved June 15, 1880, and section 2291 of the Revised Statutes of the United States.

20th. That the plaintiff herein contested the said application; that the United States Land Office at Helena, Montana, awarded to the said Maria McLean the right to purchase said tract under said application; and that plaintiff herein appealed from said action to the Commissioner of the General Land Office.

21st. That on the 20th day of February, 1885, the Commissioner of the General Land Office sustained the said application of Maria McLean to purchase said tract, and affirmed the said decisions of the said Land Office at Helena, Montana, which action was sustained by the Acting Secretary of the Interior, H. S. Muldrow, on the 28th day of March, 1887, and a United States patent to the premises in dispute was awarded to the said Maria McLean.

22d. That the premises in dispute now are and were at the commencement of this action of the value of twenty thousand dollars; that the defendant, Maria McLean, is in possession of said premises in controversy herein as the grantee under the patent issued to her by the United States of America for said premises; and that the defendants other than the said Maria McLean are in possession of said premises as tenants under said patent, or as having obtained title through conveyances from the grantee named in said patent; and that all of the defendants' title is of the same quality.

23d. That the plaintiff herein, Northern Pacific Railroad Company, was incorporated and authorized to equip and maintain its railroad and telegraph line, and was vested with all the powers and

privileges necessary to carry into effect the purposes of the act, by an act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," approved July 2nd, 1864, being the act referred to in Subdivision First of these findings.

Dated November 14th, 1892.

HIRAM KNOWLES,

Judge of Circuit Court of the United States, Ninth Circuit,  
in and for the District of Montana.

Endorsed: No. 140. In U. S. Circuit Court, District of Montana, Northern Pacific Railroad Company, plaintiff, vs. George S. Howell et al., defendants. Findings of fact. Filed Nov. 14, 1892. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 14th day of December, 1892, the judgment of the Court in the said action was duly entered herein, which said judgment is in the words and figures following, to-wit:

In the Circuit Court of the United States, for the Ninth Circuit,  
District of Montana.

Northern Pacific Railroad Company,  
Plaintiff,

vs.

Maria Amacker, John J. Amacker, her  
husband, George S. Howell, George  
Gotthardt, Walter H. Little, Alexan-  
der J. Steele, Frank H. Pings, John  
Blank, Joseph Jordan, Herbert B.  
Reed and George Dibert,  
Defendants.

This cause came on regularly for trial, on the 23rd day of May, A. D. 1892, before the Court sitting without a jury, a trial by jury having been expressly waived by stipulation in writing, signed and filed in open Court, by the attorneys of all the parties, plaintiff and defendants herein, before the trial was commenced, and on said trial F. M. Dudley and Messrs. Cullen, Sanders and Shelton appeared as counsel for plaintiff, Massena Bullard, Esq., appeared as counsel for defendants Maria Amacker and John J. Amacker, and Thomas C. Bach, Esq., appeared as attorney for the defendants George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert: whereupon George M. Bourquin and William Scott were sworn and examined on the part of the plaintiff, and Walter H. Little and Maria Amacker as witnesses on the part of the defendants, and the evidence being closed, the cause was submitted to the Court for consideration and decision, and after due deliberation

thereon the Court delivered its findings of law and fact and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

*Wherefore*, by reason of the law and the findings aforesaid, it is ordered and adjudged that the said plaintiff, the Northern Pacific Railroad Company, do have and recover of and from the said defendants Maria Amacker, John J. Amacker, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, possession of all and singular those certain premises mentioned and described in the complaint herein, to-wit:

The south ( $\frac{1}{2}$ ) one-half of the northwest ( $\frac{1}{4}$ ) quarter of Section numbered 17, of Township numbered ten (10) north of Range three west of the principal meridian of Montana. And that said plaintiff do have and recover from the said defendants its costs and disbursements in this behalf paid, laid out and expended, amounting to the sum of ninety-three 89-100 (\$93.89) dollars, and that it do have execution therefor.

Judgment entered December 14th, 1892.

GEO. W. SPROULE, Clerk.

Endorsed: No. 140. In the *Circuit Court* of the United States for the Ninth Circuit, District of Montana. The Northern Pacific Railroad Company, Plaintiff, vs. Maria Amacker et al., defts. JUDGMENT. F. M. Dudley, Cullen, Sanders and Shelton, attorneys for plaintiff.

And thereafter, to-wit, on the 16th day of December, 1892, the following further proceedings were had and entered of record herein, in the words and figures following:

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker et al.

Counsel for respective parties present in court, and on motion of counsel for defendants it is ordered that the supersedeas bond in above entitled cause be fixed in the sum of two thousand dollars (\$2,000.00).

And thereafter, to-wit, on the 22d day of December, 1892, the following further proceedings were had and entered of record herein, in the words and figures following:

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker et al.

Counsel for defendants in open court this day present their

petition for writ of error and assignment of errors, which were duly filed.

And thereupon bond as presented approved and filed, writ of error allowed, citation and writ of error issued.

Which said petition for writ of error, assignment of errors and bond are in the words and figures following, respectively:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Northern Pacific Railroad Company,  
 vs. Plaintiff,

Maria Amacker, John J. Amacker, her  
 husband, George S. Howell, George  
 Gotthardt, Walter H. Little, Alexan-  
 der J. Steele, Frank H. Pings, John  
 Blank, Joseph Jordan, Herbert B.  
 Reed and George Dibert,  
 Defendants.

*To the Judges of the above named Circuit Court:*

Come now your petitioners, the above-named defendants, Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, and respectfully represent that in the records, proceedings, and also in the rendition of the judgment in the above entitled cause which is in the said Circuit Court before you, a manifest error hath happened in the matters and things in your petitioner's bill of exceptions and their assignment of errors filed herewith, more specifically set forth, to the great injury and damage of your petitioners.

WHEREFORE your petitioners pray that it may please your honors to grant unto your petitioners a writ of error to remove said cause, and the record thereof, into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any hath happened, may be duly corrected, and full and speedy justice done your petitioners; and your petitioners in duty bound will ever pray.

THOMAS C. BACH,  
 MASSENA BULLARD,  
 Attorneys for Defendants.

Let the writ of error issue as herein prayed.

HIRAM KNOWLES, Judge.

Endorsed: (Title of Court, Title of Cause.) Petition for Writ

of Error. Filed Dec. 22, 1892. Geo. W. Sproule, Clerk. Massena Bullard and Thomas C. Bach, attorneys for defendants.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Northern Pacific Railroad Company,	}
Plaintiff,	
vs.	
Maria Amacker, John J. Amacker, her	}
husband, George S. Howell, George	
Gotthardt, Walter H. Little, Alexander	
J. Steele, Frank H. Pings, John	
Blank, Joseph Jordan, Herbert B.	
Reed and George Dibert,	
Defendants.	

Now come the defendants and specify and assign the following as errors committed by the Court on the trial of the above entitled cause, to-wit:

#### I.

The Court erred in admitting in evidence over defendants' objection so much of the certified copy of the tract book offered by plaintiff as reads "Cancelled as per Commissioner's letter 'F' of Sept. 11th, 1879."

#### II.

The Court erred in admitting in evidence over defendants' objection the letter dated July 3rd, 1879, from the Register and Receiver to the Commissioner of the General Land Office, offered by plaintiff for the purpose of showing that McLean had been duly notified to appear and show cause why his entry should not be cancelled.

#### III.

The Court erred in admitting in evidence over defendants' objection the letter offered by plaintiff and dated Sept. 11th, 1879, from the Commissioner of the General Land Office to the Register and Receiver at Helena, Montana, cancelling the homestead entry of William H. McLean.

#### IV.

The Court erred in allowing over defendants' objection the witness William M. Scott to answer the following question; as to whom he left the land covered by his pre-emption filing: "When



did you leave it, if at all?" the said question being immaterial and incompetent, the said filing appearing of record valid on its face, and no abandonment having been filed.

## V.

The Court erred in allowing over defendants' objection the witness William M. Scott to answer the following question as to whether he afterwards returned to the land: "Did you afterwards return to the land?" the said question being immaterial and incompetent, the said filing appearing of record valid on its face, and no abandonment ever having been filed.

## VI.

The special findings found by the Court are not sufficient to support the judgment, in this: The findings show that after the grant of lands by Congress to plaintiff, and prior to the filing of its map of general route in the General Land Office, one William M. Scott, on the 5th day of October, 1868, duly made pre-emption claim to the premises in controversy, with other tracts, in conformity with the provisions of the laws of the United States: that said pre-emption filing was accepted, filed and noted on the records of the Land Office at Helena, Montana, and that said filing is still, and was at the time said map of general route was filed, of record and uncancelled.

That on the 3rd day of May, 1872, and prior to the filing of plaintiff's map of general route in the United States Land Office at Helena, Montana, one William McLean, under and in conformity with the laws of the United States, made homestead entry of the premises in controversy at said U. S. Land Office at Helena, Montana.

That Maria McLean, the widow of said William H. McLean, purchased said premises in controversy under the act of Congress of June 15th, 1880, by virtue of said homestead entry, and that thereafter, to-wit, on the 17th day of June, 1887, a United States patent for the premises in controversy was issued to said Maria McLean.

Wherefore, the defendants pray that the judgment rendered in this cause may be reversed, set aside and held for naught.

THOMAS C. BACH,  
MASSENA BULLARD,

Attorneys for the Defendants.

Endorsed: (Title of Court, Title of Case.) Assignment of Errors. Filed Dec. 22, 1892. George W. Sproule, Clerk. Massena Bullard and Thomas C. Bach, Attorneys for Defendants.



## United States of America.

In the Circuit Court of the United States, Ninth Circuit,  
District of Montana.

Northern Pacific Railroad Company,  
vs. Plaintiff,

Maria Amacker, John J. Amacker, her  
husband, George S. Howell, George  
Gotthardt, Walter H. Little, Alexan-  
der J. Steele, Frank H. Pings, John  
Blank, Joseph Jordan, Herbert B.  
Reed, and George Dibert,  
Defendants.

*Know All Men by these Presents:* That we, Maria Amacker, Walter H. Little, Alexander J. Steele, and Herbert B. Reed, as principals, and George Dana Linn and Abner B. Clements as sureties, are held and firmly bound unto the above named plaintiff, Northern Pacific Railroad Company, in the sum of two thousand (2,000) dollars, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, and each and every of them jointly and severally firmly by these presents.

Sealed with our seals and dated this 22d day of December, A. D. 1892.

*Whereas*, the above named defendants, Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, have sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above entitled action by the Judge of the Circuit Court of the United States for the District of Montana.

Now, therefore, the condition of this obligation is such that if the said defendants shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation to be void, otherwise to remain in full force and virtue.

MARIA AMACKER,	[SEAL.]
WALTER H. LITTLE,	[SEAL.]
ALEXANDER J. STEELE,	[SEAL.]
HERBERT B. REED,	[SEAL.]
GEO. DANA LINN,	[SEAL.]
ABNER B. CLEMENTS.	[SEAL.]

In presence of  
E. C. BOOM.

Approved and supersedeas allowed this 22d day of December,  
 A. D. 1892. HIRAM KNOWLES,  
 Judge.

Endorsed: (Title of Court, Title of Cause.) Bond. Filed  
 Dec. 22, 1892. Geo. W. Sproule, Clerk. Massena Bullard and  
 Thos. C. Bach, attorneys for defendants.

United States of America, }  
 District of Montana. } ss.

Circuit Court of the United States, Ninth Circuit, District of  
 Montana.

I, George W. Sproule, Clerk of said Circuit Court, do hereby  
 certify and return to the honorable the United States Circuit Court  
 of Appeals for the Ninth Circuit, that the foregoing volume, consist-  
 ing of seventy-four pages numbered consecutively from one to  
 seventy-four inclusive, is a true and complete transcript of the  
 records, process, pleadings, orders, judgment and other proceedings  
 in said cause, and of the whole thereof, as appear from the original  
 records and files of said Court; and I do further certify and return  
 that I have annexed to said transcript, and included within said  
 paging the original citation, with the proof of service thereof, as also  
 the writ of error with return thereof.

In witness whereof, I have hereunto set my hand and affixed  
 the seal of said Court at Helena, in the District of Montana, this  
 13th day of January, in the year of our Lord one thousand eight hun-  
 dred and ninety-three, and of the Independence of the United States  
 the one hundred and seventeenth.

[SEAL.]

GEORGE W. SPROULE, Clerk.